Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Liberman Broadcasting, Inc. and LBI Media, Inc.	)	MB Docket No. 16-121
	)	
v.	)	File No. CSR-8922-P
	)	
Comcast Corporation and Comcast Cable Communications, LLC	)	

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Liberman Broadcasting, Inc. and LBI Media, Inc. (together, "LBI") reply to the Opposition filed by Comcast in the above-captioned proceeding. The Media Bureau ("Bureau") should grant LBI's Petition for Reconsideration ("Petition") of the *Order*[1] and refer the underlying complaint to the Administrative Law Judge to address outstanding questions of fact.

I. LBI'S PETITION PROVIDES AMPLE BASIS FOR RECONSIDERATION

Comcast and LBI agree that reconsideration is merited where a party identifies a "material error, omission, or reason warranting reconsideration."[2] LBI has met this standard.

Nearly the entirety of LBI's Petition identifies material errors and omissions, including the fact that the Bureau omits any analysis of how it can ignore the unambiguous statutory definition of "video programming," which includes programming by a "television broadcast station." This definition is a component of the broader term "video programming vendor."[3] Likewise, the Petition points out that the Bureau entirely ignored, and therefore failed to account

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[1] *See* Liberman Broadcasting, Inc. and LBI Media, Inc. v. Comcast Corporation and Comcast Cable Communications, LLC, MB Docket No. 16-121, *Memorandum Opinion and Order*, DA 16-972 (Aug. 26, 2016) ("*Order*"). This reply is filed pursuant to 47 C.F.R. § 1.106.

[2] 47 C.F.R. § 1.106(p)(1); Opposition at 4.

[3] *See Order* ¶ 12 n.55.

for, the *Commission Interim Report* to Congress, where the Commission found "video programming vendor...includes a broadcast network."[4] Comcast is able to say that LBI's arguments were fully considered and rejected in the *Order*[5] only by ignoring the very premise of LBI's Petition:[6] the *Order* failed to explain how it could omit analysis of the definition of "video programming," why the full Commission's report to Congress was not binding on the Bureau, and why the assertions of the FCC's General Counsel on brief to the D.C. Circuit court were not persuasive evidence of the agency's interpretation of "video programming vendor." Indeed, not even the full Commission, let alone the Bureau acting only on delegated authority, may change course so abruptly without offering a full explanation of why such change is warranted.

Unable to concede the obvious, Comcast also argues that the Petition should be denied, because as Comcast sees it, LBI failed to introduce new evidence or raise an intervening change in law.[7] But this is not the standard. As the parties agree, reconsideration is warranted where a party identifies a "material error, omission, or reason warranting reconsideration" in the underlying order, exactly as LBI has done.

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[4] Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Interim Report*, 8 FCC Rcd. 4875, 4889 ¶ 74 (1993) ("*Commission Interim Report*").

[5] Opposition at 4.

[6] The authorities cited by Comcast to support its arguments against reconsideration are inapplicable here. The *CMRS Order on Reconsideration* rejected a petition for reconsideration because the petitioner's arguments were "wholly speculative" or "specifically considered and rejected" in the Commission's order, and thus did not "identify any material error, omission or reason warranting consideration." *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Order on Reconsideration*, 29 FCC Rcd. 7515, 7518 ¶ 8 (2014). The *Ultra-Wideband Order* dealt with a petition for reconsideration of an order denying a previous petition and put forth only the same arguments that were made in the initial petition. *See* Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, *Third Memorandum Opinion and Order and Memorandum Opinion and Order*, 25 FCC Rcd. 11390, 11394 ¶ 11 (2010).

[7] *See* Opposition at 2, 4.

II. THE ORDER FAILS TO ADDRESS HOW "VIDEO PROGRAMMING" CAN BE READ OUT OF "VIDEO PROGRAMMING VENDOR"

Tellingly, Comcast does not dispute that the statutory term "video programming vendor" and its constituent term "video programming" are both unambiguous on their face. "Video programming" is defined by Congress as "programming provided by…a television broadcast station."[8]

Comcast asserts, however, that the Bureau "expressly addressed," "correctly reviewed," and "clearly considered" the Communications Act's definitions of both terms in determining to set aside the terms' plain meaning to consider a larger statutory scheme.[9] Comcast provides no evidence of such analysis. Rather, the only support for Comcast's claim is a footnote that references paragraphs 11 and 12 and footnote 55 of the *Order*. But neither paragraph considers the definition of "video programming" in section 602, let alone "expressly address[es]," "correctly review[s]," or "clearly consider[s]" this definition relative to section 616. In fact, rather than address the definition of "video programming," paragraph 12 makes the remarkable observation that "the language of section 616 *does not expressly exclude* broadcast licensees…." Of course, rather than not "expressly exclud[ing]" broadcast licensees, the statute unambiguously *includes* television broadcast stations by incorporating the clearly defined term "video programming."[10] In fact, the Bureau acknowledges in footnote 55 that the term "video programming vendor" unambiguously "uses the statutorily-defined term 'video programming," and then goes on to quote the statutory definition of the term. But the *Order* stops there.

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[8] 47 U.S.C. § 522(20).

[9] Opposition at 5, 7.

[10] 47 U.S.C. § 536(b).

Without more, the *Order* utterly fails to address how the Bureau can "read out" of "video programming vendor" the very term that Congress decided to include. Providing an "accounting for" the fact that Congress's unambiguous, plain language definition of "video programming vendors" includes broadcast stations requires an analysis the Bureau simply does not provide. If it did, it would have to give weight to the plain meaning of the language of sections 602 and 616. As both the D.C. Circuit and the Commission have recognized, this "immediate statutory text" is the "best evidence" of Congressional intent.[11]

While there are rare cases in which the plain meaning of a statutory term can be altered upon interpretation by the implementing agency, such cases occur only when other language in the statute creates an express conflict with such plain meaning and stubborn insistence would create an absurd result.[12] Such is manifestly not the case here.

A. Comcast's Reliance on *American Scholastic* Is Misplaced.

Contrary to Comcast's claim,[13] *American Scholastic* provides no support for its position. There, the parties did not dispute the definition of "video programming" in section 602, but

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[11] *Am. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1178-79 (D.C. Cir. 1995) ("...the immediate statutory text is the 'best evidence' of congressional intent...") ("*American Scholastic*"); DirecTV, Inc. v. Comcast Corporation, *Memorandum Opinion and Order*, 13 FCC Rcd. 21822, 21833 ¶ 24 (1998) (same); *see Account for*, Black's Law Dictionary (10th ed. 2014) (defined as "[t]o furnish a good reason or convincing explanation for; to explain the cause of").

[12] *In re Tennyson*, 611 F.3d 873, 877 (11th Cir. 2010) ("When the plain reading of a statute produces an unambiguous and reasonable definition of a term, we will not look past that plain reading and read into the text an unstated purpose."); *see Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("It is well-established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("for [an agency] to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.").

[13] Opposition at 6-7.

rather how a separate provision of the 1984 Cable Act that restricted the distribution of video programming over pay TV systems should be interpreted.[14]

In that case, neither the Commission nor the court found that the definition of "video programming" was ambiguous, and the fact that "video programming" includes broadcast programming was never disputed. Rather, the *American Scholastic* court affirmed the Commission's finding that section 533's prohibition on the distribution of video programming applied only to such programming distributed by cable systems.[15] The court found strong indications that section 533(b) was ambiguous, because among other things, section 533(b) itself authorized a waiver of the prohibition where "provision of video programming directly to subscribers *through a cable system* demonstrably could not exist except *through a cable system.*"[16] In addition, section 533(b) is found within a part of the Act entitled, "Use of *Cable Channels* and *Cable Ownership Restrictions.*"[17] In the present case, section 616 includes no similar internal inconsistencies. Both sections 616 and 602 are unambiguous on their face. Consequently, the analysis should stop at *Chevron* step one, in contrast to *American Scholastic*.

B. Comcast Does Not Provide Evidence to Justify Setting Aside Unambiguous Statutory Terms.

Comcast provides no further evidence to justify setting aside unambiguous statutory terms. It merely rehashes the *Order*'s conclusory statements that section 325(b) and 614 provide specific rights and obligations for "television broadcast stations" and section 616 provides rights

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[14] *See Am. Scholastic*, 46 F.3d at 1176-77.

[15] *See id.* at 1182.

[16] *Id.* at 1179. In other words, the section in question included language that supported the Commission's interpretation.

[17] *Id.* at 1179-80 (emphasis added).

and obligations to "video programming vendors." But this does not preclude a television broadcast station from also being a video programming vendor.

Turner does not counsel to the contrary.[18] The must-carry rules upheld in that case and section 616 serve different purposes.[19] Must carry applies to all MVPDs, and if elected, results in distribution without payment from the MVPD. Section 616 on the other hand prevents unlawful discrimination, requiring the MVPD to treat comparably affiliated and unaffiliated video programming. Only the must carry statute implements the "requirement that cable systems carry the signals of local broadcast stations."[20]

Comcast also argues that the Petition is somehow inconsistent with the rationale underlying the repeal of the cable/broadcast cross-ownership ("CBCO") rule. But a plain reading of the facts of the proceeding makes it clear that this is not the case. Neither the D.C. Circuit *Fox* decision nor the Commission's 1998 Biennial Review Report[21] mentioned section 616 as an available protection to broadcasters because the Commission had, in the *NOI* leading to the 1998 Biennial Review Report, removed section 616 from consideration. Indeed, the *NOI* explicitly stated that rules pertaining to the "nondiscriminatory treatment of broadcast stations by cable systems" were not to be addressed in the proceeding except as set forth below,[22] which set forth only the question of whether the Commission's "channel positioning and must-carry rules

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[18] *See* Opposition at 11-12.

[19] Petition at 6.

[20] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

[21] *See* 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd. 11058, 11115 ¶ 104 (2000) ("1998 Biennial Review Report"); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002).

[22] 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd. 11276, 11279 n.12 (1998).

provide sufficient protection to ensure that if a cable company owns a local television station, the cable company could not discriminate in favor of its owned television station."[23] Comcast ignores this fundamental limitation.[24]

C. LBI's Petition Cites Authoritative and Reasoned Commission Precedent.

The Commission has twice expressly found that "video programming vendors" include broadcasters. There is no Commission statement overturning this precedent.

Instead of acknowledging this, Comcast attacks LBI's citation to the *Commission Interim Report*, which expressly concluded that the term "video programming vendor" includes a broadcast television network.[25] Comcast contends that the fact that the *Commission Interim Report* was not directed at implementing section 616 itself makes the report irrelevant to this proceeding. But while the *Commission Interim Report* was conducted pursuant to section 26 of the 1992 Cable Act, the Commission's analysis explicitly addressed the definition of "video programming vendor" in section 616. The Bureau is not free to ignore this precedent merely because the definition is relevant to more than one provision of the statute.[26]

Comcast also argues that the Bureau may ignore the *Commission Interim Report* because it was not subject to the Administrative Procedure Act informal rulemaking process, nor judicial

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[23] *Id.* at 11293.

[24] Similarly, Comcast's argument in footnote 46 lacks merit. The Commission's one word response that there are no "Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals" cannot reasonably be read to preclude a broadcaster from bringing a section 616 complaint. The Commission's retransmission consent rules and programming carriage rules provide different remedies, and the ability of broadcasters to avail themselves of the program carriage rule remedies in the limited circumstances of unlawful conduct by an MVPD does not make the retransmission consent and program carriage rules duplicative, overlapping, or conflicting.

[25] *See Commission Interim Report*, 8 FCC Rcd. at 4889 ¶ 74.

[26] Indeed, there is no separate definition of "video programming vendor" to which the Commission could have been referring.

review, and thus is not "established Commission policy [or] precedent."[27] But again, this is not the standard. The Commission has explicitly recognized reports and statements as mechanisms for establishing policies[28] and routinely releases statements of policy that are not directly subject to appeal.[29] And the D.C. Circuit has expressly found that established Commission policy and precedent can be created outside of the rulemaking process. Just last year a panel of the court held that the agency was not free to interpret its own confidentiality policy statement differently than it had in the past without proffering a reasoned explanation for such departure.[30] Surely the Bureau is not empowered to do that which the court has said the full Commission may not.[31]

Neither was the *Commission Interim Report* some haphazard product with indicia that it is unworthy of reliance. The report was adopted by the full Commission with more process than the policy statement at issue in the programmers' appeal. The Commission adopted the report after public notice and considered some thirty comments and eleven reply comments, a number of which directly address the question put forth in the notice on whether broadcast networks

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[27] Opposition at 15.

[28] *See* Children's Television Programming and Advertising Practices, *Notice of Proposed Rulemaking*, 75 F.C.C.2d 138, 139 ¶ 4 (1979) (stating that the *Children's Television Report and Policy Statement* had "established policies and guidelines for children's programming and advertising...").

[29] *See, e.g.*, Forfeiture Methodology for Violations of Rules Governing Payment to Certain Federal Programs, *Policy Statement*, 30 FCC Rcd. 1622 (2015).

[30] *See CBS Corp. v. FCC*, 785 F.3d 699, 708 (D.C. Cir. 2015) ("When an agency departs from past practice, it must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. It must, in short, explain why it has changed its policy.") (internal quotation marks omitted).

[31] *See* 47 C.F.R. § 1.115(b)(2)(i) (providing action taken pursuant to delegated authority that is in conflict with statute, regulation, case precedent or established Commission policy as grounds for Commission review).

could be considered "video programming vendors" as the term was defined in section 616.[32] The *Commission Interim Report*'s conclusion that "video programming vendor" includes broadcast networks was affirmed in the subsequently issued final report to Congress.[33]

After trying (unsuccessfully) to undercut the relevance of the *Commission Interim Report*, Comcast tries to undermine subsequent Commission action that reinforces this precedent.[34] But Comcast's only citation to support this claim in fact requires the opposite conclusion. *Abbott Labs* found that "no deference was due [to] government counsel's offhand comment as to the overall scope of the regulation," but explained that deference would be earned "if the brief represents the agency's considered position and not merely the views of litigating counsel."[35] The *Tennis Channel Brief* clearly involved the latter, not the former.[36] The D.C. Circuit would be surprised to learn that it could not rely upon the Commission's statements of law on brief to the court.

Finally, Comcast asserts that the Commission's citation to the *Order* in its recent Independent Programming NPRM somehow affirms the Bureau's conclusion that broadcast licensees are not "video programming vendors."[37] This is not the case. First, the citation's

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[32] *See* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Notice of Inquiry*, 8 FCC Rcd. 1492, 1497 ¶ 31 (1993); Comments of Capital Cities/ABC, Inc. (Mar. 29, 1993); Comments of Affiliated Regional Communications, Ltd. (Mar. 29, 1993).

[33] *See* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Final Report*, 9 FCC Rcd. 3440, 3442 ¶ 3 (1993).

[34] Opposition at 14 (citing *Abbott Labs. v. United States*, 573 F.3d 1327, 1332-33 (Fed. Cir. 2009) ("*Abbott Labs*")).

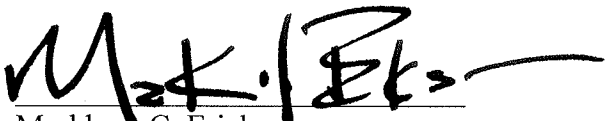
[35] *Abbott Labs*, 573 F.3d at 1333.

[36] Brief for Respondents, *Tennis Channel, Inc. v. FCC*, No. 15-1067, 2016 WL 8530547, at 4 (Oct. 21, 2015) ("*Tennis Channel Brief*").

[37] *See* Opposition at 13.

relevance is unknown. It appears in a footnote, with no analysis of or agreement with the Bureau's conclusion.[38] This can hardly be taken as an implicit affirmation of the *Order*. Second, such implicit adoption would be arbitrary and capricious. While the Commission, unlike the Bureau, is not bound by Commission precedent, it must, if changing a position, engage in reasoned decision-making, including "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action."[39] The marooned reference to the *Order* in the NPRM does no such thing.

Respectfully Submitted,



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October 13, 2016

[38] *See* Promoting the Availability of Diverse and Independent Sources of Video Programming, *Notice of Proposed Rulemaking*, FCC 16-129, ¶¶ 16 n.70, 33 n.117 (Sep. 29, 2016).

[39] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.* at 515 (citing *United States v. Nixon,* 418 U.S. 683, 696 (1974)). The Commission has previously, both in the *Commission Interim Order* and the *Tennis Channel Brief*, found and reiterated its finding that "video programming vendor" includes broadcasters.

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on this 13th day of October, 2016, I caused true and correct copies of the foregoing to be served upon the following:

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